

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Changes to the Circuit Rules effective December 1, 2009 involve Rule Nos. 10, 22, 22.2, 26, 34 and 51. The changes are highlighted below:

CIRCUIT RULE 10. Preparation of Record in District Court Appeals

(a) *Record Preparation Duties.* The clerk of the district court shall prepare within 14 days of filing the notice of appeal the original papers, transcripts filed in the district court, and exhibits received or offered in evidence (with the exceptions listed below). The transcript of a deposition is "filed" within the meaning of this rule, and an exhibit is "received or offered," to the extent that it is tendered to the district court in support of a brief or motion, whether or not the rules of the district court treat deposition transcripts or exhibits as part of the record. These materials may be designated as part of the record on appeal without the need for a motion under Fed. R. App. P. 10(e). Counsel must ensure that exhibits and transcripts to be included in the record which are not in the possession of the district court clerk are furnished to the clerk within **fourteen days** after the filing of the notice of appeal. The following items will not be included in a record unless specifically requested by a party by item and date of filing within **fourteen days** after the notice of appeal is filed or unless specifically ordered by this court:

briefs and memoranda,
notices of filings,
subpoenas,
summonses,
motions to extend time,
affidavits and admissions of service and mailing,
notices of settings,
depositions and notices, and
jury lists.

(b) *Correction or Modification of Record.* A motion to correct or modify the record pursuant to Rule 10(e), Fed. R. App. P., or a motion to strike matter from the record on the ground that it is not properly a part thereof shall be presented first to the district court. That court's order ruling on the motion will be transmitted to this court as part of the record.

(c) *Order or Certification with Regard to Transcript.* Counsel and court reporters are to utilize the form prescribed by this court when ordering transcripts

or certifying that none will be ordered. For specific requirements, see Rules 10(b) and 11(b), Fed. R. App. P.

(d) *Ordering Transcripts in Criminal Cases.*

(1) *Transcripts in Criminal Justice Act Cases.* At the time of the return of a verdict of guilty or, in the case of a bench trial, an adjudication of guilt in a criminal case in which the defendant is represented by counsel appointed under the Criminal Justice Act (C.J.A.), counsel for the defendant shall request a transcript of testimony and other relevant proceedings by completing a C.J.A. Form No. 24 and giving it to the district judge. If the district judge believes an appeal is probable, the judge shall order transcribed so much of the proceedings as the judge believes necessary for an appeal. The transcript shall be filed with the clerk of the district court within 40 days after the return of a verdict of guilty or, in the case of a bench trial, the adjudication of guilt or within seven days after sentencing, whichever occurs later. If the district judge decides not to order the transcript at that time, the judge shall retain the C.J.A. Form No. 24 without ruling. If a notice of appeal is filed later, appointed counsel or counsel for a defendant allowed after trial to proceed on appeal in forma pauperis shall immediately notify the district judge of the filing of a notice of appeal and file or renew the request made on C.J.A. Form No. 24 for a free transcript.

(2) *Transcripts in Other Criminal Cases.* Within **14 days** after filing the notice of appeal in other criminal cases, the appellant or appellant's counsel shall deposit with the court reporter the estimated cost of the transcript ordered pursuant to Rule 10(b), Fed. R. App. P., unless the district court orders that the transcript be paid for by the United States. A non-indigent appellant must pay a pro rata share of the cost of a transcript prepared at the request of an indigent co-defendant under the Criminal Justice Act unless the district court determines that fairness requires a different division of the cost. Failure to comply with this paragraph will be cause for dismissal of the appeal.

(e) *Indexing of Transcript.* The transcript of proceedings to be transmitted to this court as part of the record on appeal (and any copies prepared for the use of the court or counsel in the case on appeal) shall be bound by the reporter in a volume or volumes, with the pages consecutively numbered throughout all volumes. The transcript of proceedings, or the first volume thereof, shall contain a suitable index, which shall refer to the number of the volume as well as the page, shall be cumulative for all volumes, and shall include the following information:

(1) An alphabetical list of witnesses, giving the pages on which the direct and each other examination of each witness begins.

(2) A list of exhibits by number, with a brief description of each exhibit

indicating the nature of its contents, and with a reference to the pages of the transcript where each exhibit has been identified, offered, and received or rejected.

(3) A list of other significant portions of the trial such as opening statements, arguments to the jury, and instructions, with a reference to the page where each begins.

When the record includes transcripts of more than one trial or other distinct proceeding, and it would be cumbersome to apply this paragraph to all the transcripts taken together as one, the rule may be applied separately to each transcript of one trial or other distinct proceeding.

(f) *Presentence Reports.* The presentence report is part of the record on appeal in every criminal case. The district court should transmit this report under seal, unless it has already been placed in the public record in the district court. If the report is transmitted under seal, the report may not be included in the appendix to the brief or the separate appendix under Fed. R. App. P. 30 and Circuit Rule 30. Counsel of record may review the presentence report at the clerk's office but may not review the probation officer's written comments and any other portion submitted in camera to the trial judge.

(g) *Effect of Omissions from the Record on Appeal.* When a party's argument is countered by a contention of waiver for failure to raise the point in the trial court or before an agency, the party opposing the waiver contention must give the record cite where the point was asserted and also ensure that the record before the court of appeals contains the relevant document or transcript.

CIRCUIT RULE 22. Death Penalty Cases.

(a) *Operation and Scope.*

(1) These rule applies to all cases involving persons under sentence of capital punishment.

(2) Cases within the scope of this rule will be assigned to a panel as soon as the appeal is docketed. The panel to which a case is assigned will handle all substantial matters pertaining to the case, including certificates of appealability, stays of execution, consideration of the merits, second or successive petitions, remands from the Supreme Court of the United States, and associated procedural matters. If a judge on the panel is unavailable to participate, another judge may be substituted.

(3) Pursuant to 18 U.S.C. §3006A, and 21 U.S.C. §848(q), 28 U.S.C. §2254(h), and 28 U.S.C. §2255(g), appellate counsel shall be appointed for any person under a sentence of death who is financially unable to obtain representation, requests that counsel be appointed, and does not already have counsel appointed by a state under 28 U.S.C. §2261.

(4) The panel to which a case is assigned may make changes in procedure and scheduling in any case when justice so requires.

(b) Notice of Appeal and Required Documents.

(1) The district court clerk must notify the clerk of this court by telephone immediately upon the filing of a notice of appeal of a case within the scope of this rule. In all cases within the scope of this rule, the district court clerk must immediately transmit the record to the court of appeals. A supplemental record may be sent later if items are not currently available.

(2) Upon receipt of the record from the district court clerk, or any petition, application or motion invoking the jurisdiction of this court, the clerk of this court shall docket the appeal. The panel will be immediately notified.

(3) Upon filing a notice of appeal, the appellant shall immediately transmit to the court four copies of, or a citation to, each state or federal court opinion, memorandum decision, order, transcript of oral statement of reasons, or judgment involving an issue to be presented on appeal to this court. If a document or transcript is needed and is not immediately available, appellant shall submit an affidavit as to the decision and reasons given by the court. Appellant shall file the document or transcript as soon as it is available.

(c) Briefs.

(1) Unless the court sets another schedule, the following time limitations apply.

(A) On direct appeal in a federal criminal prosecution, the appellant shall serve and file a brief within 63 days after the date on which the appeal is docketed. The appellee shall serve and file a brief within 49 days after service of the brief by the appellant. The appellant may serve and file a reply brief within 21 days after service of the brief by the appellee.

(B) In all other cases within the scope of this rule the appellant will have 28 days from the date on which the notice of appeal is filed to file and serve a brief. The appellee then will have 21 days from the service of the brief to file and serve a brief. Within seven days after service of the appellee's brief,

appellant may file and serve a reply brief.

(2) If an issue is raised that was not presented at a prior stage of the litigation (for example, in the district court, the appropriate state court, or this court on a prior appeal), the party raising the issue must state why the issue was not raised and why relief should nonetheless be granted.

(d) *Submission and Oral Argument.*

(1) The court will hear oral argument in every direct appeal in a federal criminal prosecution and in every appeal from the decision concerning an initial petition under 28 U.S.C. §2254 in a state case. In any other case, a request for oral argument will be evaluated under the standards of Fed. R. App. P. 34(a).

(2) Oral argument will be held expeditiously after the filing of the reply brief.

(3) The merits of an appeal may be decided summarily if the panel decides that an appeal is frivolous. In such a case, the panel may issue a single opinion deciding both the merits of the appeal and the motion for a stay of execution.

(e) *Opinion or Order.*

(1) The panel's decision shall be made without undue delay. In cases to which 28 U.S.C. §2266 applies, the panel's decision will be issued no later than 120 days after the date the reply brief was filed.

(2) In cases in which an execution date has been set and not stayed, the panel will release the decision with dispatch to allow the losing party time to ask for rehearing or consideration by the Supreme Court.

(f) *Panel or En Banc Rehearing.*

(1) Any active judge of the court may, within 14 days after filing of the opinion, notify the panel and the clerk to hold issuance of the mandate and poll the court for en banc consideration. If the mandate has already issued, it may be recalled by the panel or by the en banc court. All judges are to vote within 14 days after the request for the vote on en banc consideration. A judge unable by reason of illness or absence to act within the time allowed by this rule may extend the time to act for a reasonable period upon written notice to the other judges. Unless within 30 days after the petition for rehearing, or the answer to the petition (if one has been requested), is filed, a majority of the panel, or of the judges in active service, has voted to grant rehearing or rehearing en banc, the court will enter an order denying the petition.

(2) If the court decides to rehear an appeal en banc, the appeal will be scheduled for oral argument expeditiously and decided within the time allowed by 28 U.S.C. §2266(c).

(g) *Second or Successive Petitions or Appeals.* A second or successive petition or appeal will be assigned to the panel that handled the first appeal, motion for stay of execution, application for certificate of appealability or other prayer for relief. A motion for leave to commence a second or successive case is governed by Circuit Rule 22.2 and likewise will be assigned to the original panel.

(h) *Stay of Execution.*

(1) A stay of execution is granted automatically (A) on direct appeal in a federal criminal prosecution by Fed. R. Crim. P. 38(a), and (B) in some state cases by 28 U.S.C. §2262(a). A stay of execution is forbidden in some state cases by 28 U.S.C. §2262(b) and (c). All requests with respect to stays of execution over which the court possesses discretion, or in which any party contends that §2262 or Rule 38(a) has not been followed, must be made by motion under this rule.

(2) An appellant may not file a motion to stay execution or to vacate a stay of execution unless there is an appeal accompanied by a certificate of appealability or four copies of a request that this court issue a certificate of appealability together with a copy of the district judge's statement as to why the certificate should not issue. The request for a certificate of appealability and the motion to stay execution shall be decided together.

(3) The movant shall file four copies of the motion and shall immediately notify opposing counsel by telephone. If the following documents have not yet been filed with this court as part of the record, a copy of each shall be filed with each copy of the motion:

- (i) certificate of appealability;
- (ii) the complaint, petition or motion seeking relief in the district court and the response thereto;
- (iii) the district court decision on the merits;
- (iv) the motion in the district court to stay execution or vacate stay of execution and the response thereto; and
- (v) the district court decision on the motion to stay execution or vacate stay of execution.

If any required document cannot be filed, the movant shall state the reason for the omission.

(4) If an issue is raised that was not presented at a prior stage of the

litigation (for example, in the district court, the appropriate state court, or this court on a prior appeal), the party raising the issue must state why the issue was not raised and why relief should nonetheless be granted.

(5) If the attorney for the government has no objection to the motion for stay, the court shall enter an order staying the execution.

(6) Parties shall endeavor to file motions with the clerk during normal business hours. Parties having emergency motions during nonbusiness hours shall call the clerk's telephone number for recorded instructions. The clerk shall promptly notify, by telephone, the designated representatives of the appropriate governmental body or counsel for petitioner of any such motions or other communications received by the clerk during nonbusiness hours. Each side must keep the clerk informed of the home and office telephone number of one attorney who will serve as emergency representative.

(7) An order of the panel granting or denying a motion to issue or vacate a stay of execution shall set forth the reasons for its decision.

(i) *Clerk's List of Cases*. The clerk shall maintain a list by jurisdiction of cases within the scope of this rule.

(j) *Notification of State Supreme Court Clerk*. The clerk shall send to the state supreme court a copy of the final decision in any habeas corpus case within the scope of this rule.

CIRCUIT RULE 22.2. Successive Petitions for Collateral Review

(a) A request under 28 U.S.C. §2244(b) or the final paragraph of 28 U.S.C. §2255 for leave to file a second or successive petition must include the following information and attachments, in this order:

(1) A disclosure statement, if required by Circuit Rule 26.1.

(2) A short narrative statement of all claims the person wishes to present for decision. This statement must disclose whether any of these claims has been presented previously to any state or federal court and, if it was, how each court to which it was presented resolved it. If the claim has not previously been presented to a federal court, the applicant must state either:

(A) That the claim depends on a new rule of constitutional law, made

retroactive to cases on collateral review by the Supreme Court; or

(B) That the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and that the facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the applicant guilty of the crime, had there been no constitutional error.

(3) A short narrative statement explaining how the person proposes to establish the requirements mentioned above. An applicant who relies on a new rule of constitutional law must identify the new rule, the case that establishes that rule, and the decision of the Supreme Court that holds this new rule applicable to cases on collateral review.

(4) Copies of all opinions rendered by any state or federal court previously rendered in the criminal prosecution, any appeal, and any collateral attack.

(5) Copies of all prior petitions or motions for collateral review.

(b) A copy of the application, together with all attachments, must be served on the attorney for the appropriate government agency at the same time as the application is filed with the court. The application must include a certificate stating who was served, by what means, and when. If the application is made by a prisoner who is not represented by counsel, filing and service may be made under the terms of Fed. R. App. P. 4(c).

(c) Except in capital cases in which execution is imminent, the attorney for the custodian (in state cases) or the United States Attorney (in federal cases) may file a response within 14 days. When an execution is imminent, the court will not wait for a response. A response must include copies of any petitions or opinions that the applicant omitted from the papers.

(d) The applicant may file a reply memorandum within 14 days of the response, after which the request will be submitted to a panel of the court for decision.

(e) An applicant's failure to supply the information and documents required by this rule will lead the court to dismiss the application, but without prejudice to its renewal in proper form.

CIRCUIT RULE 26. Extensions of Time to File Briefs

Extensions of time to file briefs are not favored. A request for an extension of time shall be in the form of a motion supported by affidavit. The date the brief is due shall be stated in the motion. The affidavit must disclose facts which establish to the satisfaction of the court that with due diligence, and giving priority to the preparation of the brief, it will not be possible to file the brief on time.

In addition, if the time for filing the brief has been previously extended, the affidavit shall set forth the filing date of any prior motions and the court's ruling thereon. All factual statements required by this rule shall be set forth with specificity. Generalities, such as that the purpose of the motion is not for delay, or that counsel is too busy will not be sufficient.

Grounds that may merit consideration are:

(1) Engagement in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth (a) a description of action taken on a request for continuance or deferment of other litigation; (b) an explanation of the reasons why other litigation should receive priority over the case in which the petition is filed; and (c) other relevant circumstances including why other associated counsel cannot either prepare the brief for filing or, in the alternative, relieve the movant's counsel of the other litigation claimed as a ground for extension.

(2) The matter under appeal is so complex that an adequate brief cannot reasonably be prepared by the date the brief is due, provided that the complexity is factually demonstrated in the affidavit.

(3) Extreme hardship to counsel will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

The motion shall be filed at least **seven days** before the brief is due, unless it is made to appear in the motion that the facts which are the basis of the motion did not exist earlier or were not, or with due diligence could not have been, known earlier to the movant's counsel. Notice of the fact that an extension will be sought must be given to the opposing counsel together with a copy of the motion prior to the filing thereof.

In criminal cases, or in other cases in which a party may be in custody (including military service), a statement must be set forth in the affidavit as to the custodial status of the party, including the conditions of the party's bail, if any.

CIRCUIT RULE 34. Oral Argument

(a) *Notice to Clerk.* The names of counsel intending to argue orally shall be furnished to the clerk not later than **two business days** before the argument.

(b) *Calendar.*

(1) The calendar for a particular day will generally consist of three appeals scheduled for oral argument at 9:30 a.m., one appeal scheduled for oral argument at 10:30 a.m., and two appeals scheduled for oral argument at 2:00 p.m. The amount of time allotted for oral argument will be set based on the nature of the case. The clerk will notify counsel of the allocation approximately 21 days before the argument. The types of cases listed below are to be given priority, though the sequence of listing here is not intended to indicate relative priority among the types of cases.

(i) Appeal from an order of confinement after refusal of an immunized witness to testify before the grand jury. (These appeals must be decided within 30 days.) 28 U.S.C. § 1826.

(ii) Criminal Appeals. Rule 45(b), Fed. R. App. P.

(iii) Appeals from orders refusing or imposing conditions of release, which will be heard without the necessity of briefs. Rule 9, Fed. R. App. P.

(iv) Appeals involving issues of public importance.

(v) Habeas corpus and 28 U.S.C. § 2255 appeals.

(vi) Appeals from the granting, denying, or modifying of injunctions.

(vii) Petitions for writs of mandamus and prohibition and other extraordinary writs. Rule 21(b) and (c), Fed. R. App. P.

(viii) "Any other action if good cause therefore is shown. For purposes of this subsection, 'good cause' is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of Title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit." 28 U.S.C. § 1657.

(2) Consideration will be given to requests addressed to the clerk by out-of-town counsel to schedule more than one appeal for oral argument the same day in order to minimize travel time and expenses.

(3) Requests by counsel, made in advance of the scheduling of an appeal for oral argument, that the court avoid scheduling the oral argument for a particular day or week will be respected, if possible.

(4) Once an appeal has been scheduled for oral argument, the court will not ordinarily reschedule it. Requests under subparagraphs (2) and (3) of this paragraph should therefore be made as early as possible. Counsel should have in mind that, when practicable, criminal appeals are scheduled for oral argument shortly after the appellant's brief is filed and civil appeals shortly after the appellee's brief is filed.

(c) *Divided Argument Not Favored.* Divided arguments on behalf of a single party or multiple parties with the same interests are not favored by the court. When such arguments are nevertheless divided or when more than one counsel argues on the same side for parties with differing interests, the time allowed shall be apportioned between such counsel in their own discretion. If counsel are unable to agree, the court will allocate the time.

(d) *Preparation.* In preparing for oral arguments, counsel should be mindful that this court follows the practice of reading briefs prior to oral argument.

(e) *Waiver or Postponement.* Any request for waiver or postponement of a scheduled oral argument must be made by formal motion, with proof of service on all other counsel or parties. Postponements will be granted only in extraordinary circumstances.

(f) *Statement Concerning Oral Argument.* A party may include, as part of a principal brief, a short statement explaining why oral argument is (or is not) appropriate under the criteria of Fed. R. App. P. 34(a).

(g) *Citation of Authorities at Oral Argument.* Counsel may not cite or discuss a case at oral argument unless the case has been cited in one of the briefs or drawn to the attention of the court and opposing counsel by a filing under Fed R. App. P. 28(j). The filing may be made on the day of oral argument, if absolutely necessary, but should be made sooner.

(h) *Argument by Law Student.* The court may permit a law student to present oral argument under supervision of a member of this court's bar, with the client's written approval, if the representation is part of a program of an accredited law school. The supervising attorney's motion must be filed at least 14 days before the date on which argument is to be held and must state the reasons why presentation of argument by a law student is appropriate.

CIRCUIT RULE 51. Summary Disposition of Certain Appeals by Convicted Persons; Waiver of Appeal

(a) Duties of Criminal Trial Counsel.

Trial counsel in a criminal case, whether retained or appointed by the district court, is responsible for the continued representation of the client desiring to appeal unless specifically relieved by the court of appeals upon a motion to withdraw. Such relief shall be freely granted. If trial counsel was appointed by the district court and a notice of appeal has been filed, trial counsel will be appointed as appellate counsel without further proof of the client's eligibility for appointed counsel. If the client was not found to be eligible for Criminal Justice Act representation in the district court but appears to qualify on appeal, trial counsel must immediately assist the client in filing in the district court a motion to proceed as one who is financially unable to obtain an adequate defense in a criminal case. This motion must be accompanied by an affidavit containing substantially the same information as contained in Form 4 of the Appendix to the Federal Rules of Appellate Procedure. If the motion is granted, the court of appeals will appoint trial counsel as appellate counsel unless the district court informs the court of appeals that new counsel should be appointed. If the motion is denied by the district court, trial counsel may file a similar motion in the court of appeals. Counsel may have additional duties under Part V of the Circuit's Plan implementing the Criminal Justice Act of 1964.

(b) Withdrawal of Court-Appointed Counsel in a Criminal Case. When representing a convicted person in a proceeding to review the conviction, court-appointed counsel who files a brief characterizing an appeal as frivolous and moves to withdraw (see *Anders v. California*, 386 U.S. 738 (1967); *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985)) shall file with the brief a proof of service which also indicates the current address of the client. Except as provided in paragraph (g) of this rule, the clerk shall then send to the client by certified mail, return receipt requested, a copy of the brief and motion, with a notice in substantially the form set out in Appendix I to these rules. The same procedures shall be followed by court-appointed counsel and the clerk when a motion to dismiss

the appeal has been filed by the appellee and the appellant's counsel believes that any argument that could be made in opposition to the motion would be frivolous.

(c) Time for Filing Motion to Withdraw in a Criminal Case.

Any motion to withdraw for good cause (other than the frivolousness of an appeal) must be filed in the court of appeals within 14 days of the notice of appeal. The court of appeals will make all appellate appointments.

(d) Notice of Motion to Dismiss Pro Se Appeal. When a convicted person appears *pro se* in a proceeding to review the conviction, and the government moves to dismiss the appeal for a reason other than failure to file a brief on time, the clerk shall, unless paragraph (e) of this rule applies, send to the convicted person by certified mail, return receipt requested, a copy of the motion with a notice in substantially the form set out in Appendix II to these rules.

(e) Dismissal if No Response. If no response to a notice under paragraph (a) or (b) of this rule is received within 30 days after the mailing, the appeal may be dismissed.

(f) Voluntary Waiver of Appeal. Notwithstanding the preceding paragraphs, if the convicted person consents to dismissal of the appeal after consultation with appellate counsel, the appeal may be dismissed upon the filing of a motion accompanied by an executed acknowledgment and consent in substantially the form set out in Appendix III to these rules. See Rule 42(b), Fed. R. App. P.

(g) Incompetent Appellant. If, in a case in which paragraph (a) or (b) of this rule would otherwise be applicable, the convicted person has been found incompetent or there is reason to believe that person is incompetent, the motion shall so state and the matter shall be referred directly to the court by the clerk for such action as law and justice may require.